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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1966

No. 667

SEAROAD SHIPPING COMPANY
and SEAROAD (Bahamas) LTD.,
Petitioners,

vs.

E. I. duPONT deNEMOURS AND COMPANY,
INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The District Court's Findings (R. 46-52) were amended to correct matters of form, including the identity of the claimant of the respondent vessel (R. 260-263).

The opinion of the Circuit Court of Appeals is also reported in 1966 A. M. C. 1405 (Adv. No. 6, June, 1966).

QUESTION PRESENTED

Did Petitioners factually establish legal justification for above deck carriage of Respondent's goods which resulted in their loss?

STATEMENT OF THE CASE

Respondent, as shipper and owner of a shipment of explosives instituted this cargo cause in Admiralty against the Motor Vessel "Sea Lane" (ex. "Lillian"), claimed by Petitioner, Searoad (Bahamas) Led., in rem; and against Petitioner, Searoad Shipping Company, in personam.

The goods were not delivered, in the prosaic language of Petitioners, because: " * * * when dynamite is left resting in sixteen fathoms of water it can't be delivered" (R. 74).

The bills of lading were "clean" i.e., not claused for on-deck carriage and no issue exists that had the goods been afforded proper under-deck stowage they would not have been lost overboard.

Petitioners sought to counter the issue of deviation on the basis of legally required certification on the shipping documents that the goods be loaded under Coast Guard supervision; alleged custom; or waiver of under-deck carriage on the part of Respondent.

The District Court held Petitioners responsible for the loss resulting from deviation, and, apart from deviation responsible by virtue of Petitioners' failure to estab-

lish the loss to have occurred as a result of perils of the sea asserted as a defense (Pet. App. 3-9).

The Circuit Court of Appeals affirmed on the basis of deviation finding it unnecessary to reach the additional basis of liability found by the District Court. (Pet. App. 13-21)

In affirming, the Circuit Court of Appeals made an exhaustive review of the record, factually and legally, including the statutory and regulatory provisions underlying Petitioners' contention respecting Coast Guard supervision, in light of Petitioners' alleged errors. The decision of the Court of Appeals concluded the nature of the goods was such that they could permissively be stowed under or above deck under Coast Guard supervision; that Petitioners had not established a custom of the port or trade to contemplate above-deck carriage; and that Petitioners had neither established a waiver of under-deck carriage, nor legal acquiescence in on-deck carriage amounting to an authoritative waiver of under-deck shipment, by one having requisite authority and awareness of the legal practical significance of what was taking place.

ARGUMENT

1. There is no conflict with the decisions of this Court.

Petitioners claim that the decision below is in conflict with **The Carlos F. Roses** (1900) 177 U.S. 655. Such is not the case. **Roses**, a prize case, involved the capture and seizure of cargoes under circumstances where claim-

ants of the property had the burden of establishing, in simplest terms: That legal title, as distinguished from mere equitable interest, in the cargoes was in a non beligerent. **Roses** in present context held no more than that the nature of the transaction underlying the transfer of the negotiable bill of lading representing the cargo could be inquired into to determine whether the transfer created an equitable or legal interest in the transferee.

The instant case deals with a bill of lading as the contract of carriage rather than as a possible document of title. As such this case is controlled by **The Delaware** (1872) 81 U.S. 779, and **St. Johns N. F. Shipping Corp. vs. S. A. Companhia Geral Commercial Do Rio de Janeiro** (1923) 263 U.S. 119; cited and properly applied to the record of this case in the decision below.

The **Roses** decision was rendered prior to the decision in **St. Johns** and subsequent to the decision in **The Delaware.**

2. There is no important question of Federal Law which has not been settled by this Court.

Petitioners assert that an extremely important question bearing on the legal effect of negotiable instruments in daily use throughout the country is involved.

The short answer to this assertion has been made above. This court long ago laid down the criteria which have been properly applied to this record in the decision below.

The criteria of this Court's cases have long been fully appreciated as evidenced by the absence of controversy and reported cases on the same subject. It is not unusual for the carrier to assume the insuror obligations of on-deck carriage in order to obtain the freight, and for the shipper to rely upon such responsibility on the part of the carrier. **A/S Ludwig Mowinckels Rederi v. Accinanto** (4th Cir., 1952) 199 F.2d 134, 145, cert. den. 345 U.S. 992.

3. Petitioners attempt to secure a review of correct factual determinations below.

The decision below fully reviews the record and Petitioners' contentions in light thereof. Petitioners' contentions were found without support in the record. The burden of proof was Petitioners' respecting these matters.

While the record shows some prior shipments had moved on deck it is not shown that such movement was other than in deviation; nor was it shown that such on-deck carriage was because the vessel had no under-deck facilities acceptable for the stowage of explosives had Petitioners not loaded general cargo therein.

The record is quite clear that while the witness could not recall the names of all the specific vessels, nevertheless at least fifty per cent of explosives cargoes were carried below deck (R. 85-87; 97-102).

Respondent had an agent authorized to effect the required certificates on customs documents (R. 166). However, as found in the decision below there was no showing of an intentional, authoritative waiver of under-deck car-

riage or of the legal consequences of deviation arising therefrom.

4. Petitioners, having failed to establish "perils of the sea" defense, were held liable to Respondent apart from deviation.

Apart from deviation, Petitioners were also correctly found liable on additional grounds by the District Court (Pet. App. 7-8) which the decision below found unnecessary to pass upon (Pet. App. 21).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent's Brief In Opposition was personally delivered to W. F. Parker, Attorney for Petitioners, at his office, 516 Ingraham Building, Miami, Florida, on the 7th day of November, 1966.

Richard F. Ralph
Attorney for Respondent